

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR PORTER,

Defendant-Appellant.

UNPUBLISHED

June 10, 2003

No. 237040

Wayne Circuit Court

LC No. 00-011772-01

Before: Talbot, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Defendant was charged with assault to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. Following a bench trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and felony firearm. Defendant was sentenced to consecutive terms of one to ten years' imprisonment for the assault conviction and two years for the felony firearm conviction. We affirm.

I. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient for his conviction of assault with intent to do great bodily harm. Specifically, defendant argues that there was no evidence of any specific intent on his part to commit an assault. We disagree.

Defendant did not need to take any special steps to preserve this issue for appeal because, by his argument, he invokes his constitutional right to due process of law. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). To determine whether the evidence presented at trial was sufficient to sustain the conviction, this Court views the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Grayer*, 252 Mich App 349, 355; 651 NW2d 818 (2002).

The elements of assault with intent to do great bodily harm less than murder are “(1) an assault, i.e., ‘an attempt or offer with force and violence to do corporal hurt to another’ coupled with (2) a specific intent to do great bodily harm less than murder.” *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996) (quotation omitted). “[T]he specific intent necessary to constitute the offense may be found in conduct as well as words.” *People v Mack*, 112 Mich App 605, 611; 317 NW2d 190 (1981). Similarly, the jury may infer the defendant’s specific

intent from the circumstantial evidence. *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992).

Here, when viewed in a light most favorable to the prosecution, the evidence indicates the following circumstances surrounding the conduct for which defendant was convicted. Two days before the shooting incident, Tremaine Portis went to the house of his neighbor, Tanganyika Shack, in search of his friend John Johnson, also a neighbor. He found Johnson and Shack discussing the matter of ten dollars that Shack allegedly owed Johnson. Defendant, who was Shack's boyfriend, came into the living room and told Portis and Johnson not to argue in his girlfriend's house. As Portis and Johnson were leaving the house to go to the local store, Shack told them that she would pay Johnson when the two men returned from the store. Afterward, the two men returned to Shack's house. Johnson stood on the porch and argued with Shack, who was in the house. Portis and defendant were standing on the driveway. When Portis noticed that defendant had a gun, he told defendant that he would remove Johnson from the premises and would pay Johnson the ten dollars so that Johnson would not return to the house. When Johnson learned that defendant had a gun, he stopped arguing with Shack and he walked away from the house toward the street. Meanwhile, Portis was trying to calm defendant. However, defendant pulled the gun out of his pocket, said "you have a problem with me John," and shot at Johnson's direction. Johnson was not injured.

Two days later, Portis encountered Shack at the neighborhood store. It is unclear from the record what exactly was discussed between the two. However, Shack called defendant and asked him to pick her up from the store because she was afraid. Portis left the store and was walking home with Johnson's brother, Terrance Daniels, when defendant's car pulled up a few feet in front of them, braked and came to a stop. Shack was in the front passenger side of the car. Defendant jumped out of the vehicle and aggressively asked whether Portis was still "running" his mouth. Portis handed the bag of groceries he was carrying to Daniels.

According to defendant, he stopped behind two cars at a stop sign and Shack told him that Portis was "rushing" their car. Defendant claimed that he could not drive forward or in reverse. Defendant asserted that he feared for his life because Portis had, in their previous encounter, threatened to kill defendant. Defendant left the car to face Portis. Defendant testified that he had a gun on him at the time of the shooting.

It was undisputed that the two men were arguing a few feet behind the car. Defendant placed his left hand on Portis' shoulder and pulled out a gun. Defendant testified that the gun went off, but it discharged to the ground. He denied that Portis was shot. Portis, on the other hand, testified that he heard a loud bang and felt something poke into his abdomen. Daniels fled, defendant went back to his car and drove away and Portis ran home, holding his abdominal area with the realization that he had just been shot.

Given the nature of the previous encounter between defendant and Johnson when defendant shot at Johnson, considering the conflicting testimony with respect to defendant's conduct at the time of the shooting, and given defendant's own testimony that Shack had no reason to shoot Portis,¹ we conclude that the trial court could have found beyond a reasonable

¹ The defense's theory of the case alluded to the possibility that Shack may have shot Portis.

doubt that defendant acted with the requisite intent to cause Portis great bodily harm. Although defendant denied ever intending to hurt Portis and purportedly fired a warning shot to the ground, we will not invade the province of the factfinder and assess credibility anew when considering the proofs in a light most favorable to the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). The evidence at trial was sufficient to support defendant's conviction.

II. Self-Defense

Defendant argues that the trial court erred in concluding that defendant did not meet the requirements for the defense of self-defense. We disagree. The trial court's factual findings are reviewed for clear error. A finding of fact is considered clearly erroneous if, after review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made. *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991). "An appellate court will defer to the trial court's resolution of factual issues, especially where it involves the credibility of witnesses." *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997).

Our Supreme Court, in *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002), recently reiterated the elements of the law of self-defense, as follows:

As a general rule, the killing of another person in self-defense by one who is free from fault is justifiable homicide if, under all the circumstances, he honestly and reasonably believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force. The necessity element of self-defense normally requires that the actor try to avoid the use of deadly force if he can safely and reasonably do so, for example by applying nondeadly force or by utilizing an obvious and safe avenue of retreat. [*Riddle, supra* (footnotes omitted).]

Defendant contends that the trial court erroneously believed that, to invoke the law of self-defense, a defendant should have seen a gun on the victim. Defendant argues that he was only required to show that he reasonably believed that he was in danger. We disagree. The evidence in this case showed that defendant did not attempt to retreat from his confrontation with Portis. Therefore, defendant was required to offer uncontested evidence that he was the victim of "a sudden, fierce, and violent attack" or that he reasonably believed that Portis was "about to use a deadly weapon." *Riddle, supra*. Defendant's evidence in this case was contested, and there was nothing to indicate that defendant was a victim of a "a sudden, fierce, and violent attack." This case also presented a witness credibility contest. Defendant testified that he was justified in his claim of self-defense because Portis appeared to be reaching for a gun. Defendant admitted that he had a gun and that the gun fired one shot. Portis and Daniels both testified that Portis did not have a gun and that defendant was the aggressor. Questions of credibility and intent should be left to the trier of fact and will not be resolved anew by this Court. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). It is clear from the record that the trial court was searching for proof that would justify a finding of the necessary elements for the law of self-defense. We conclude that the court properly determined that defendant failed to satisfy those elements.

Defendant next argues that the trial court erred when it expressly discredited the testimony of Detroit Police Investigator Beryl Mandeville who testified that defendant blurted out a statement to the effect that defendant shot the victim out of self-defense. We disagree. The court rejected that officer's testimony on the ground that the officer may have been biased or frustrated by the line of defense counsel's questioning. Defendant fails to show how the court's determination affected his case. Defendant, himself, testified to his theory of self-defense in this case.

III. Prosecutorial Misconduct

Defendant next argues that the prosecutor committed misconduct requiring reversal. We disagree. This Court reviews claims of prosecutorial misconduct case by case to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). However, we review unpreserved claims of prosecutorial misconduct for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). In order to avoid forfeiture of an unpreserved claim, the defendant must demonstrate plain error that was outcome determinative. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 434; 597 NW2d 843 (1999).

Defendant identifies three specific areas of concern. Defendant first claims that his due process rights were violated when the prosecutor withheld exculpatory ballistics evidence. A defendant has a due process right to obtain evidence in the possession of the prosecutor if it is favorable to the defendant and material to guilt or punishment. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994), citing *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). The word "material" has been interpreted to mean exculpatory evidence that would raise a reasonable doubt about the defendant's guilt. *Stanaway, supra*, citing *United States v Agurs*, 427 US 97, 104; 96 S Ct 2392; 49 L Ed 2d 342 (1976). "The test for whether the material should have been provided to him is 'whether it contains information that probably would have changed the outcome of his trial.'" *Stanaway, supra*.

In this case, the firearms expert witness testified that the pellets that were removed from the victim's abdomen came from a shotgun or one of the limited number of single-shot pistols that are specifically designed to shoot .410 caliber shells. On cross-examination, the expert witness testified that it was impossible for such shell to be fired from a .32 or .38 caliber gun. Defendant testified that he was carrying a .38 caliber gun at the time of the shooting. However, defendant has not demonstrated that the expert witness' testimony was material. The exculpatory nature of the evidence depended solely on witness credibility. No weapon was admitted into evidence and the trial court, as the finder of fact, was required to assess witness credibility to determine whether defendant used the .38 caliber gun he allegedly had at the time of the shooting or used a different gun designed to fire .410 caliber shells. The evidence indicated that defendant could have used a single-shot gun at the time of the shooting. Defendant testified that Shack had a shotgun that required hand-made bullets, but that she disposed of it the day after the shooting. The record shows that the court assessed the credibility of the witnesses and the circumstances of the shooting and determined that whatever gun defendant had used, it was capable of shooting the .410 caliber shell. Because defendant has not demonstrated that the testimonial evidence was material, there was no prosecutorial misconduct.

Defendant next argues that the prosecution improperly coached its witness by asking a question the answer of which the prosecution knew from the witness' testimony at the preliminary examination. Here, the prosecutor asked the complainant about the size of the gun that defendant had at the time of the shooting. We cannot discern from defendant's brief on appeal what exactly he argues. We see no error in the relevant portion of the trial transcript. Rather, the prosecutor was properly presenting his proofs in this case.

Defendant next argues that the prosecutor withheld from him statements made by Shack. The record shows that Shack was initially listed as defendant's witness. However, defendant decided not to call any of his witnesses. The prosecutor called Shack as a rebuttal witness following defendant's trial testimony.

From our review of the record, we conclude that defendant was aware of Shack's statements before trial. Immediately before trial, defense counsel informed the trial court that he discussed the matter with the prosecutor, and that two of the prosecutor's *res gestae* witnesses were to testify about statements that Shack had made. Defense counsel asserted that these statements could only come in as prior inconsistent statements. However, the prosecution did not call those witnesses, but made them available to defendant. In closing argument, defense counsel alluded to the possibility that Shack's testimony was tainted or influenced because she was brought to court from the correctional facility where she was incarcerated. Therefore, there was no prosecutorial misconduct.

IV. *Miranda*² Rights

Defendant next claims that certain statements he allegedly uttered to Investigator Mandeville were inadmissible³ because they were made in violation of his *Miranda* rights. Specifically, defendant asserts that Mandeville tainted the trial because she falsely testified. Because defendant did not object to the admission of the statements below,⁴ this Court reviews this unpreserved claim for plain error affecting defendant's substantial rights. *Carines, supra*.

Investigator Mandeville testified that when defendant was in the police car following an identification line-up, defendant blurted out a statement to the effect that he shot Portis with birdshot. Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly and intelligently waived his Fifth Amendment rights. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). Here, defendant volunteered the statement. Volunteered statements made by suspects in custody do not fall within the purview of *Miranda*, and are admissible. *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997). Further, defendant does not assert that he was coerced into making the statement in violation of his *Miranda* rights; he merely asserts that Mandeville falsely testified. Whether Mandeville falsely testified in this case was of no consequence. The trial court expressly rejected the

² *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

³ Defendant had earlier argued on appeal that the trial court erred in rejecting a portion of Mandeville's testimony under his claim of self-defense, *infra*.

⁴ Defense counsel informed the trial court that he did not move to suppress the statement because defendant maintained that he did not make the statement at issue.

testimony as it found Mandeville to be biased or frustrated by the line of questioning at trial. Accordingly, defendant has not demonstrated any error.

V. The Effective Assistance of Counsel

Defendant argues that he was denied the effective assistance of counsel. We disagree. Because Smith failed to preserve the issue by bringing a motion for a new trial or *Ginther*⁵ hearing, our review of the issue is precluded unless the appellate record contains sufficient detail to support the defendant's claim. *People v Sabin (on Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). In claiming that his trial counsel was ineffective, a defendant must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *Id.* at 659. Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999), nor will it assess counsel's competence with the benefit of hindsight. *Rice, supra* at 445.

Defendant identifies several areas of concern. He first asserts that counsel was ineffective for refusing defendant's request to call two witnesses who would have testified to a prior inconsistent statement by Shack. We disagree. The record shows that defendant, himself, decided not to call those witnesses. Defendant expressly acquiesced with his counsel's statement before the trial court that defendant did not wish to call these witnesses and has therefore waived the issue for review. A defendant may not waive objection to an issue before the trial court and then raise it as an error before this Court. To hold otherwise would allow defendant to harbor error as an appellate parachute. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998).

Defendant next provides an enumerated list of five errors that he claim constituted ineffective assistance of counsel. These include counsel's alleged failure "to get ballistics," to "object or get delay for *Brady*⁶ violations," to call John Johnson as a res gestae witness, "to object to failure of prosecution to provide statement of Ms. Shack," and failure to subpoena a witness upon defendant's request. Beyond the above cursory enumeration of alleged errors, defendant provides no explanation or analysis. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Therefore, we do not address these claims.

Defendant next claims that there was inadequate time in which to prepare for the trial and that counsel failed to discern from defendant what he knew about the witnesses. Again, defendant fails to show how his counsel's performance was below an objective standard of reasonableness under prevailing norms or how the outcome of the proceedings would have been

⁵ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

⁶ *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

different. A review of the record shows that counsel was adequately prepared and he thoroughly questioned all the witnesses in a manner that clearly brought out the theory of the defense. Therefore, defendant's claim is without merit.

Defendant next asserts that his counsel's closing argument was ineffective. Specifically, defendant contends that his counsel should have focused on defendant's testimony to the effect that he was defending his former girlfriend, that the complainant identified defendant's gun as being a .32 or a .38, and that the evidence demonstrated the impossibility of shooting a .410 from a .32 or a .38 gun. Defendant also contends that counsel should have argue that there was no evidence of specific intent for the assault conviction and that the evidence was sufficient only for a conviction of the lesser-included offense of general intent misdemeanor.

Defendant does not explain how the proffered arguments would have made a difference in the outcome of the bench trial. A review of the record indicates that the trial court, as the trier of fact, was fully was aware of the issues in the case and correctly applied the law. *People v Armstrong*, 175 Mich App 181, 184-185; 437 NW2d 343 (1989). On this record, we find no error. Therefore, defendant's counsel was not ineffective.

VI. Motion for New Trial

Defendant asserts that the trial court abused its discretion when it denied his motions for a directed verdict and a new trial. We disagree. Both motions were raised on the ground that the trial court made erroneous factual findings. Because defendant argued this issue in both motions, we will address it using the stricter standard applicable to reviewing a denial of a motion for new trial based on the verdict being against the great weight of the evidence. *People v Simon*, 174 Mich App 649, 653; 436 NW2d 695 (1989). See also, MCR 2.611(A)(1)(e).

The trial court may grant a new trial if it finds the verdict was not in accordance with the evidence and that an injustice has been done. *Simon, supra*. This Court will find an abuse of discretion only where the denial of the motion was manifestly against the clear weight of the evidence. *People v Stiller*, 242 Mich App 38, 49, 53; 617 NW2d 697 (2000). The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

In this case, defendant asserts in his statement of the issues that the trial court abused its discretion when it denied both motions without adequately articulating the reasons. However, defendant fails to address this argument in the analysis portion of his brief on appeal. Rather, he raises only four matters: that the trial court failed to read the trial transcripts; that it failed to read the motions; that it denied the motion for a new trial without allowing oral arguments; and that it failed to articulate the reasons for its denial of only the motion for a new trial.

Both motions were contained in one motion and an accompanying brief. The transcript of the hearing shows that the trial court expressly stated that it read the motions and the accompanying brief, and that it read the prosecution's response to the motions. The court also explained that it did not need to read the trial transcript because it was the trier of fact in this case and it remembered the evidence. It is readily apparent from the hearing transcript that the court was cognizant of the evidence and facts in this case and it was cognizant of the witness credibility contest that the case presented. Further, the hearing transcript shows that defendant

made oral argument with respect to both motions. We disagree with defendant's claim that the court failed to articulate the reasons for its decision to deny the motions. The court responded to each of defendant's arguments and explained its reasoning for the factual findings at issue.

Although defendant has a law degree and accordingly, should be aware of the requirement to properly identify and analyze his claim and support it with citation of supporting authority, he has failed to do so. Nonetheless, because he is representing himself in propria persona on this appeal, we have reviewed the record with respect to this issue. We conclude that the trial court properly denied the motions.

Affirmed.

/s/ Michael J. Talbot

/s/ Janet T. Neff

/s/ Kirsten Frank Kelly